

Legal Issues in Sun Safety for Canadian Workplaces

Which province or territory are you working in? Are you in a federal workplace? Different jurisdictions have different occupational health and safety (OHS) legislation. The wording used in describing the elements of your sun safety program should match the wording of the OHS legislation that applies to your workplace. The roles and responsibilities for people set out in your sun safety program should take into account the duties in OHS legislation for different types of people. For example, should you consult with your workplace health and safety committee when developing your sun safety program? Do you even have a committee?

All legal considerations for your sun safety program cannot be considered here. As a disclaimer, we are not providing legal advice or opinion. This is about legal information. Our purpose here is to “red flag” certain aspects of OHS legislation that you should enquire about when developing, implementing, and monitoring your sun safety program.

On this page, we list the legal issues you should consider. We describe their implications for your sun safety program in general terms. More detail is provided for each Canadian jurisdiction in separate fact sheets.

General Terms

To avoid confusion, you should consider using the terms in your applicable OHS legislation when drafting the elements of your sun safety program. Some provinces use “worker” and some use “employee”. Should your health and safety committee be called a “joint health and safety committee” or a “workplace safety and health committee”? Why call the official coming to your workplace an “inspector” in your documents when your OHS legislation calls such people “officers”?

If you are going to use the same terms in your documents that are used in your OHS legislation, be sure you understand how the term is defined in the legislation. Sometimes a word is defined in a way that is quite different from a dictionary definition. Here are some examples.

“Employer” could be defined in an OHS Act in a way that matches common usage. But in some OHS Acts, an “employer” is also a person who “contracts for the services” of someone. That would mean that an ordinary employer would have employer duties for non-employees – people who we would normally call contractors. Is it your intention that all the elements of your sun safety program apply to non-employees?

If one of your people suffers a severe sunburn from exposure on the job, should the incident be reported to your OHS regulator? That will depend on how “critical injury” or “severe injury” are defined in your OHS Act.

Constructors, contractors and prime contractors

In some jurisdictions, the owner of a workplace is not responsible for the OHS needs of the people engaged in construction on the workplace. Instead, a “constructor” or a “prime contractor” might be responsible. “Prime contractor” has opposite meanings in different provinces. If the owner is going to be in charge of a construction project, not a general contractor, will the owner require sub-contractors to adopt some or all of the owner’s sun safety program? Contractors doing construction work and contractors doing non-construction work are often not treated the same under OHS legislation.

Committees and Representatives

Most Canadian jurisdictions require that medium to large size workplaces have OHS committees and smaller workplaces have single individuals who are health and safety representatives. The OHS Act will usually have specific requirements for the involvement of the committee or representative in the development, implementation, and monitoring of your sun safety program. The employer may have a duty to consult with the committee or representative when selecting sunscreen or protective clothing under your sun safety program. Committee members or representatives usually have duties concerning workplace inspections. There may be an express role to play when developing or implementing training programs. Close consideration should be paid to the inclusion of OHS committees and representatives in all aspects of your sun safety program.

Who Has Personal Duties?

Canadian OHS legislation is based primarily on the philosophy or approach known as the Internal Responsibility System (IRS). This means that everyone in the organizational chart has OHS integrated into their work, and that each individual does the kind of OHS work that is compatible with their authority and control. An OHS Act promotes the IRS to the extent that there are duties for individuals at all levels of the organization. All Canadian OHS Acts have duties for individual workers/employees. To the extent that everyone in the organizational chart is an employee, it can be said that all individuals have duties. It is a better reflection of the IRS if there are duties that are specifically for supervisors, managers, and officers (CEO & vice presidents).

When developing the “roles and responsibilities” part of your sun safety program, attention should be given to tracking the structure of duties in your OHS Act. If your OHS Act does not have express duties for supervisors, managers, and officers nothing prevents you from going beyond the generalities of your OHS Act and setting out duties for such categories of people in your sun safety program.

In an ideal world it shouldn’t matter, but in practice many people are motivated by the

realization that they have personal legal obligations. It is best to be clear in a sun safety program which desired activities are closely tied to legal duties.

General Duty Clauses

Which workplace parties have general duties to take reasonable care or precautions to protect workers, beyond compliance with specific duties in the regulations? Employers almost always have such general duties. In some jurisdictions supervisors, workers, and senior managers have general duties. In others, they don't. The initial concern is to track the proper wording. A general duty may use different wording, for example: "all reasonable care"; "every precaution reasonable in the circumstances"; or do everything "reasonably practicable". A general duty in an OHS Act does not depend on the regulations for its content. It is not about specific hazards and controls. It is open-ended. It requires hazard and risk assessment to figure out what has to be done above and beyond the regulations.

The existence, or not, of general duties is critical. If the OHS regulations in a jurisdiction do not mention sun exposure as a hazard, or do not have specific requirements for sun safety measures such as water, sunscreen, shading, or rest breaks, then can it be said that a general duty implicitly requires them? The answer depends on risk and it is contextual. If, in the circumstances, there is significant risk from sun exposure, then a general duty requires that precautions be taken. A requirement for a sun safety program would be implied by the general duty.

Specific Duties in the OHS Act

Most OHS Acts have a range of duties for employers and individuals that are general, but not as general as general duty clauses. Employers and supervisors may have duties to advise workers of any hazards of the job. If there is significant risk from sun exposure, then it can be said that there is a duty to advise workers of the hazards of sun exposure. A supervisor may have a duty to ensure that workers are using or wearing protective devices or clothing that the employer has decided they must use or wear. If, under a sun safety program, the employer has decided that workers should use or wear protection such as sun hats and sunscreen, then it can be said that a supervisor has a legal obligation to ensure that his or her workers are using or wearing them. If a worker/employee has a duty to comply with the regulations, then the worker/employee has a duty to wear or use and protective clothing or devices that the regulations require to be worn or used.

Some specific duties in an OHS Act stand alone; they do not depend on the regulations for their content. Duties to advise workers/employees are good examples. Other specific duties in an OHS Act have no content unless the regulations are consulted; what is "prescribed" in the regulations.

When developing your sun safety program, both the regulation-dependent and regulation-independent duties have to be considered. It is advisable to track the wording of the legislation when describing your sun program elements. Our Model Sun Safety Program can help you build a sun safety program including the various program elements.

Sun Safety Requirements in the Regulations

Some jurisdictions in Canada have requirements for aspects of sun safety in their OHS regulations. In other jurisdictions there is no mention at all. Typically, there will be requirements to protect workers/employees from heat or thermal stress. It is a question whether the intent is to include the sun as a source of heat stress or whether the requirements refer only to heat sources created in the workplace. Similarly, there may be provisions that refer to protection from “radiation” or more specifically to “non-ionizing radiation” or even more specifically to “UV radiation”. Again, it is a question whether solar radiation is covered, or only sources in the workplace, such as welding, are covered.

Other potentially relevant requirements in the regulations are those concerning the provision of drinking water, or the requirements for a schedule of work breaks. These requirements can usually be tied to desired practices under your sun safety program.

Hazard and Risk Assessment

There may or may not be express requirements for the employer to undertake a process of hazard or risk assessment. If there is, then that process should be adopted when developing your sun safety program. There is more flexibility if there is no such formal process, but it may still be said that hazard and risk assessment for sun exposure should be done because of general duties.

OHS Policy and Program Requirements

Some OHS Acts require that employers develop OHS policies and programs. Others do not. Some OHS Acts, or their regulations, have specific requirements for the contents of these policies and programs. The design of a sun safety program should take these requirements into consideration. There are variations in whether and to what degree a workplace health and safety committee should be involved in developing OHS policies and programs.

Reporting and Notification

Do workers/employees have a duty to report contraventions or hazards to their supervisor or employer? If so, would events such as a failure to provide information about sun safety be a

contravention? Would an event such as heat exhaustion or sunburn be a reportable event? The answers will vary across Canadian jurisdictions.

There are two other reporting/notification concerns. First, are there requirements to notify the inspectorate (Ministry or Department that administers OHS legislation) when fatalities or critical/serious injuries occur. The latter are often defined. It is a question whether there is a legal requirement to report sun exposure incident. Must there be an “accident” that causes the harm? Is a sunburn a “burn” within the meaning of these reporting provisions? Your sun safety program should follow the requirements of your OHS legislation.

Second, there may be a separate requirement to report sun exposure incidents to the workers’ compensation agency in your jurisdiction. Some jurisdictions have separate OHS Acts and workers’ compensation Acts. Others combine these into one Act. The federal jurisdiction does not have a general workers’ compensation regime. The provincial regimes are used. Reporting events to a workers’ compensation agency will depend on whether reporting is contingent on the existence of absence from work (lost time), or the provision of first aid or medical aid. The wording of the legislation differs across Canadian jurisdictions. Reporting and notification requirements in your sun safety program should take these requirements into account.

Compensation for Sun Safety Harms

Does the workers’ compensation regime provide compensation for injuries to health from work-related sun exposure? There are different categories of compensation: wage replacement when a worker/employee is off work due to a work-related injury; compensation for non-economic loss; and compensation to the worker/employees’ family or dependents if there is a fatality. In many cases it is difficult to demonstrate that a particular cancer was caused by a workplace exposure as opposed to an exposure off-the-job. There are no easy answers here. There are often no answers at all. One can only make predictions how a particular case will be handled. Often a workers’ compensation agency’s policies must be consulted. Sometimes there will be administrative boards or tribunals which will have made relevant decisions. To the extent that it is possible, these considerations can be included in elements of your sun safety program.

Work Refusals

In some jurisdictions, work refusals are phrased as a duty not as a right. But in both cases, a worker/employee’s refusal to do work will depend on how the “trigger” is defined in a particular OHS Act. Sometimes the “trigger” is not defined. Can a worker/employee refuse work because there is a contravention? Or because there is a “danger”? Or either? Must the potential harm be to the worker/employee him or herself, or could it be to a co-worker or even a non-employee? Consideration should be given to whether a work refusal could be based on exposure to solar heat stress or solar radiation. In some jurisdictions, the risk of cancer may not

be sufficiently “imminent” to be the basis of a work refusal. Or, the risk of a sunburn may not be “serious” enough.

In some jurisdictions, there is a process that is in between a work refusal and a report. There may be a “complaint resolution process”. Can sun safety events be the basis of a complaint that should be dealt with through such a process?

Orders and Directions

A government official (an officer or an inspector) can issue a command that may be called an “order” or a “direction” or something else. There are two general types. The less serious is a “contravention” order (or “compliance” order) – the order is based on a finding by the official that a specific provision in the OHS Act or regulations has been breached. The nature of the order is a command that the recipient bring itself back into compliance. The more serious is a “danger” order or a “stop work” order. Here, whether or not there is a specific contravention, the official has determined that the risk is so high that the employer (usually) must take immediate action to eliminate the hazard or reduce the risk. The work must stop until this is done. Can sun safety events be the basis for either type of order in your jurisdiction?

In some jurisdictions, the government official can issue a “ticket” for a “set fine” for a contravention of a regulation. Often the details will be found under a separate, generic Act such as an offences Act, contraventions Act or summary convictions Act. Tickets are for minor offences. They may be relevant if there are specific requirements in OHS regulations for sun safety.

There is a trend in recent years to give government officials the power to impose “administrative monetary penalties”. These penalties are for dollar amounts in between the high fines in the penalty provisions of an OHS Act and the relatively low fines that are the subject of tickets. The details vary across Canadian jurisdictions.

Occupational Health Services

Depending on the size of the organization, or the kind of hazards that are present, an employer may be required, in some jurisdictions, to establish an “occupational health service”. The details required vary, but can involve medical professionals and periodic testing or examinations. Records must be kept. Often there will be educational requirements. Are sun exposure incidents included in the kinds of situations that require the establishment of an occupational health service? Or, are they to be included in the activities of an occupational health service should one be required for other reasons?

Codes, Standards, Guidelines and Protocols

Some OHS legislation allows the regulator to identify or adopt codes, standards, guidelines, or protocols (the terminology differs). These are not law on their own. They can become law if the legislation says they can be adopted into the legislation (usually the regulations). A relevant example would be guidelines established by the ACGIH for heat stress. They can also be relevant as a standard for what is “reasonable” when it comes to compliance with general duty clauses in OHS legislation.

Even if there is no such express reference to these kinds of standards, they may still be very relevant in determining compliance with general duty clauses. The extent to which such standards have been adopted, or used, or recommended in a particular jurisdiction is an important consideration when developing a sun safety program.

New Workers and Seasonal Workers

It is not common, but some jurisdictions may have express duties for the employer regarding new employees or seasonal employees. Historically, employers have not felt the need to expend resources on training workers who may not be with the employer for a long time. Seasonal workers/employees are often summer employees – people who work outdoors and are exposed to the sun. It would be highly relevant to take into account any such requirements. They are usually concerned with education or training.

Jurisdiction-Specific Sun Safety Laws

For information on sun safety legal issues associated with your jurisdictional OHS legislation, please refer to our jurisdiction-specific sun safety fact sheets. These are available at sunsafetyatwork.ca.

Visit sunsafetyatwork.ca for more information. This fact sheet was prepared by Dr. Peter Strahlendorf, August 2016. Production of this resource has been made possible through financial support from Health Canada through the Canadian Partnership Against Cancer.